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No. 79-1388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and
STATE OF LOUISIANA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE, JOAN PAILLOT FEENSTRA

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QUESTIONS PRESENTED

I. Whether Louisiana Civil Code Article 2404, which gives the husband, as head and master of the community, the power to alienate community property without the consent and permission of his wife, denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

II. Whether the prospective ruling of the Fifth Circuit Court of Appeals, which held Article 2404 of the Louisiana Civil Code unconstitutional, should be applied to the parties litigant to void the mortgage held by appellant on appellee's home.

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BRIEF FOR APPELLEE, JOAN PAILLOT FEENSTRA

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at 609 F.2d 727 (1979). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 430 F.Supp. 642 (1977).

STATEMENT OF THE CASE

During the course of their marriage, Joan and Harold Feenstra purchased a family home located on Irish Bayou Subdivision, Lot #7, Section 8, New Orleans, Louisiana. At first, they rented this property and used their rental payments as a downpayment on its purchase. Finally, they purchased their home in both their names and paid off their mortgage on the home. Harold Feenstra used his wages to make both the rental payments and mortgage payments. Mrs. Feenstra, however, also contributed her earnings from her fishing to the rental and mortgage payments. Therefore, under both Louisiana law and equity, she owns a share of the community real property.

In October of 1974, appellee, Mrs. Feenstra, learned that her husband, Harold Feenstra, had molested their daughter. Joan Feenstra asked her husband to leave their marital abode, but he refused. She was forced to file criminal charges against her husband as her only means of keeping her husband away from the family home and so protecting her child. Harold Feenstra was arrested and imprisoned on or about October 12, 1974, and charged with crime against nature upon his nine-year-old daughter.

From Parish Prison, Harold Feenstra retained Karl J. Kirchberg, plaintiff and defendant in counterclaim, to defend him against these charges. On October 17, 1974, Harold Feenstra signed a promissory note as pre-payment for legal services to the order of Karl J. Kirchberg for $3,000.00 with interest at the rate of 8% per annum and providing for 30% attorney's fees if not paid when due. The following day, Feenstra made a payment to Karl J. Kirchberg of $809.57. On October 22, 1974, Harold Feenstra executed an Act of Mortgage, in favor of Kirchberg. This Act of Mortgage

reiterated a debt of $3,000.00 despite Feenstra's prior payment.

Mrs. Feenstra was not informed nor was she given any notice whatsoever of the execution of recordation of the mortgage on her home. She had no idea of the existence of the mortgage on her home until, well over a year after the mortgage was executed, Kirchberg threatened the seizure of her home unless she paid her husband's legal debt, stating he was going to use the property for trailer rentals. Kirchberg would not send a copy of the mortgage to Mrs. Feenstra's attorney. Her first official notice of the existence of the mortgage was Kirchberg's suit in Civil District Court for a mortgage foreclosure by executory process.

Without any knowledge that her home had been mortgaged or the existence of her husband's attorney, Mrs. Feenstra dismissed the charges against her husband. She had removed the threat upon her daughter and was reluctant to put her daughter in the further damaging position of testifying at trial against her father and being cross-examined. Harold Feenstra was released from custody and liability and had no need for legal representation. Mrs. Feenstra was responsible for the cessation of further criminal action being taken against Feenstra.

Harold Feenstra moved into his own quarters after his release from jail. He desired to give his wife the entire interest in their community home and move out of state. Kirchberg told Feenstra he would draw up the necessary papers for signature, but he never did. C. Howard McCaleb, III, Kirchberg's associate, obtained a separation from bed and board for Feenstra on June 10, 1975. Feenstra made payment to Kirchberg for $150.00 on the date prior to the filing of this petition and for $75.00 on the date of judgment. Feenstra then moved out of state with the belief that the property would be turned over to his wife.

After judgment was obtained for their legal separation, Kirchberg demanded payment from Mrs. Feenstra and threatened seizure of her home. In February, 1976, he petitioned for a mortgage foreclosure by executory process in Civil District Court for the Parish of Orleans, entitled *Karl J. Kirchberg vs. Joan Paillot, widow of first marriage to Tweed Keller Marsh, wife of/and Harold C. Feenstra,* No. 76-3121. Pursuant to said petition an order for executory process was issued and the Civil Sheriff for the Parish of Orleans seized and is presently holding the real property which is the subject of said mortgage.

Appellant Kirchberg also filed an action in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment that he had not violated the Truth-in-Lending-Act, 15 U.S.C. §1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed, *inter alia,* against appellant Kirchberg, the State of Louisiana and the Governor, urging that Louisiana Civil Code Article 2334 was unconstitutional on equal protection and due process grounds. Article 2334, as it existed prior to January 1, 1977, was a companion to Article 2404 in that it allowed the husband to alienate real community property without the wife's knowledge or consent provided that the wife had not taken the affirmative and additional step of executing and filing a notarized declaration that her consent and authority were needed for any subsequent alienation or encubmerging of that property.[1] Mrs. Feenstra had made no such declaration.

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[1]Since January 1, 1977, Louisiana Civil Code Article 2334 provided that any real property standing in the names of both spouses could not be mortgaged without the wife's consent. See opinion below, 609 F.2d at 730. That revision was not applicable to the 1974 mortgage at issue herein. *Id.* at n.2.

The District Court in April, 1977, granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim for a declaration of unconstitutionality. The District Court (as did the Court of Appeals) saw the gravamen of her claim as directed against Article 2404, the head and master provision, that gave the husband the exclusive power to unilaterally alienate the community estate.

Mrs. Feenstra appealed the constitutional claim against appellant Kirchberg, the State of Louisiana and the Governor. The Fifth Circuit panel unanimously reversed, finding that Article 2404 was unconstitutional under the Fourteenth Amendment. The case was decided in an opinion issued December 12, 1979. A mandate was issued on January 3, 1980 to the District Court. On January 1, 1980, Louisiana's current gender-neutral scheme for community property management went into effect. The new law, which came too late to benefit Mrs. Feenstra, repealed the statute declared to be unconstitutional by the Fifth Circuit. Only Mr. Kirchberg has appealed the Fifth Circuit's ruling to this Court.

SUMMARY OF ARGUMENT

The court below held that Article 2404 of the Louisiana Civil Code, which designated the husband as head and master of the community and gave him exclusive power to administer the community estate, was violative of the equal protection clause of the Fourteenth Amendment. The Fifth Circuit decision, supported in all respects by this Court's precedents and by common principles of equity warrants swift and secure affirmation.

I

The Louisiana head and master system unconstitutionally discriminates on the basis of sex. The absolute power over marital property which it bestows to men reinforces the sterotypes, long imposed by society, that wives because of their dependency on their husbands are inferior in managerial and business skills. The gender-based classification established by state law is burdened with the "baggage of sexual sterotypes." The citizens of Louisiana and any legislative purpose could be better served by a gender-neutral scheme of management over community property which avoids the sharp sex lines drawn by Article 2404, *Orr v. Orr,* 440 U.S. 268,282 (1979). As of January 1, 1980, Louisiana has repealed this patently offensive statute and substituted a system of equal management for its invidiously discriminatory head and master scheme.

A gender-based classification is subject to equal protection scrutiny which demands that such classifications "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197 (1976). Article 2404 which allows husbands to alienate and control the marital property, but which never allows wives an equal share of managerial power, has definitely established a gender-based classification. And the sharp sex lines drawn by the State cannot be avoided by elaborate statutory declarations or prenuptial contracts which the wife must record in order to free herself of male domination over the marital property. Whether or not an insurmountable barrier exists to prevent a litigant from freeing herself of a state's discriminatory action is an "analytical anomaly" and bears no "constitutional significance," *Trimble v. Gordon,* 430 U.S. 762, 773-74 (1977).

It is difficult to determine what the legitimate state interest is in fostering the sex-based classification of the head and master scheme, but all the proposed and possible state objectives for the discriminatory nature of Article 2404 bear no substantial relationship to the gender-based classification. Moreover, the Louisiana Legislature's adoption of a gender-neutral system for community management, effective January 1, 1980, is suggestive of the fact that it is not possible to show the substantial relationship between Article 2404 and the objective sought to be achieved by Article 2404, *Kirchberg v. Feenstra,* 609 F.2d, 727, 735 (5th Cir. 1979). Thereby the Louisiana head and master system over community property does gender-classify and should not survive present constitutional scrutiny. See *Orr v. Orr,* 440 U.S. 268, 282-83 (1979).

II

The declaration by the lower court that Article 2404 is unconstitutional as of December 12, 1979, has had minimal, if any impact, on the smooth functioning of community management and creditors' rights as against married persons. Since 1977 no husband in Louisiana could alienate community immovable property without the consent of his wife, unless a declaration to the contrary was recorded by his wife, Louisiana Civil Code Ann. Article 2334 (as amended, West Supp. 1979). On January 1, 1980, previously passed legislation went into effect that repealed Article 2404, so everyone in Louisiana has been on notice for months that the judicially decreed unconstitutional activity would no longer be sanctioned by statute. Furthermore, the decision below was made non-retroactive. It is highly unlikely that anyone

other than the parties litigant will be affected by the lower court's pronouncement.

In addition, neither the State nor Governor have appealed the Fifth Circuit decision. Their conspicuous absence coupled with the repeal of Article 2404 strongly suggest that the State's interests have not been impaired in any way. In fact, in June 1980, the State filed a Motion to Dismiss this appeal and have filed as appellees. The State must consider that its Civil Code is secure and its citizens protected despite the holding of the unconstitutionality of the head and master scheme. Surely, appellant Kirchberg does not need to partake in a cause on behalf of the State when the Attorney General's Office has declined to do so. Appellant's catalog of horrors portending great harm to creditors and the "balanced equality" of the Civil Code, in light of these events, is exaggerated.

III

Appellant Feenstra is not asking this Court to make retroactive a holding that Article 2404 is unconstitutional, but rather that a prospective only decree include the parties litigant so that the mortgage held on her family home may be declared null and void. Otherwise Mrs. Feenstra's long struggle through the Federal courts would have been in vain. Because Article 2404 has been repealed as of January 1, 1980 and the Fifth Circuit decision was made prospective as of December 12, 1979, it is impossible that any one other than Mr. Kirchberg and Mrs. Feenstra would be affected by the declaration of the unconstitutionality of the Louisiana head and master system. This was the intention of the State when they originally asked for a prospective ruling from the

Fifth Circuit, as evidenced by their brief to the lower court, their failure to appeal the Fifth Circuit decision, and their subsequent Motion to Dismiss the Appeal filed as appellees. It was the intention of Mrs. Feenstra when she agreed not to contest a prospective ruling.

Article III of the Constitution compels Federal Courts only to resolve actual, concrete cases and controversies and not address hypothetical questions. The Fifth Circuit went out of its way to state that a case and controversy was presented by the parties before the Court, *Kirchberg v. Feenstra,* 609 F.2d 727, 731 (1979), which indicates the holding of unconstitutionality, while prospective only, was intended to apply to the mortgage on Mrs. Feenstra's home. Any other interpretation would result in an advisory opinion below. Mrs. Feenstra's benefit from the prospective overruling of Article 2404 is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum", *Stoval v. Denno,* 388 U.S. 293, 301 (1967). If not parties would lose all incentive to bring lawsuits seeking the overruling of patently offensive law.

Thus, there is no precedent and no equitable reason for the parties litigant to be excluded from a prospective overruling of Article 2404. Any other result would be contrary to the expressed desires of the briefing parties before the Fifth Circuit, and the lower court decision would stand as an advisory opinion.

ARGUMENT

I

THE LOUISIANA HEAD AND MASTER STATUTE IS UNCONSTITUTIONAL AS IT DISCRIMINATES ON THE BASIS OF SEX AND VIOLATES THE FOURTEENTH AMENDMENT.

A. The standard to be applied to gender based classifications is that they must serve important governmental objectives and must be substantially related to the achievement of those objectives; Article 2404 cannot withstand such equal protection scrutiny.

The last decade has seen the evolving of a standard of review to be applied when gender is the basis of legislative classifications. The analysis began in 1971, in *Reed v. Reed,* 404 U.S. 71, when this Court put lawmakers on notice that mere rational basis for a sex-based classification would no longer survive constitutional scrutiny. The Idaho statute which gave mandatory preference to a male over a female for appointment as administrator of an estate was held to be a denial of equal protection because the preference failed to have a "fair and substantial relation" to the legislative objective, *id* at 76. Since 1976, the rule set out in *Craig v. Boren,* 429 U.S. 190, 197, has been recognized as the standard of review to be applied to sex discrimination cases.

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

This stricter standard of review for gender-based classi-

fications has been frequently reaffirmed by this Court; *Califano v. Webster,* 430 U.S. 313, at 316-317 (1977), (per curiam); *Orr v. Orr,* 440 U.S. 268, at 279 (1979); *Califano v. Westcott,* 433 U.S. 76, at 85 (1979); *Wengler v. Druggists Mutual Ins. Co.,* ____ U.S. ____, at ____, 64 L. Ed. 2d 107, at 115 (1980). There can be no doubt that Louisiana Civil Code Article 2404[2] fails to survive this substantial scrutiny and offends any notion of equality in marriage.

The first step in determining the constitutionality of the Louisiana head and master statute is to establish that a gender based classification does indeed exist. Through Article 2404, Louisiana has established a most obvious discriminatory scheme because of its automatic preference for husbands over wives. On its face it gives all power of management of the community property to the husband and leaves nothing for the wife, except the right to sue his heirs at the dissolution of the community if she can prove he injured her by fraud. By making the husband the head and master of the community and giving him the unlimited power to administer and alienate all community property without the consent or permission of his wife, the State of Louisiana has clearly created a classification by gender.

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[2]Article 2404 stated:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Article 2404 was repealed effective January 1, 1980. However, all mortgages executed prior to 1980 are subject to the husband's head and master powers, and appellee, Mrs. Feenstra, is not affected by the repeal. Hereinafter, all references to Article 2404 will be made to the above statute as it existed prior to the repeal.

In the case at bar, Mrs. Feenstra never knew of the mortgage on her home until after her husband had left the State. The mortgage was to her total detriment and certainly did not improve her family's lot. Yet it was assumed by the law of Louisiana that the husband would be better able to serve the marital community because of his superior commercial skills and that the wife would benefit from his absolute power over the property of the marriage.

> Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. . . *Kirchberg v. Feenstra,* 609 F.2d 727, 733 n.14 (5th Cir. 1979).

Article 2404 represents the clinging to "baggage of sexual stereotypes", *Orr v. Orr,* 440 U.S. 268, 283 (1979) which this Court has sought to curtail.

Statutory schemes which are based on sexual stereotypes or on presumptions of superior male abilities without substantial beneficial purpose have been consistently denied constitutional protection by this Court. See *Frontiero v. Richardson,* 411 U.S. 677 (1973) (where female armed service member had to prove she provided more than one-half of her husband's support for husband to receive the same benefits that wife of male armed service member automatically received based on presumption that women were supported by their husbands); *Taylor v. Louisiana,* 419

U.S. 522 (1975) (where women were exempted from jury duty because of their "presumed role in the home"); *Stanton v. Stanton,* 421 U.S. 7 (1975) (where the sex-based age of majority was based on overboard or "loose-fitting" generalizations about males); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), *Califano v. Goldfarb,* 430 U.S. 199 (1977) and *Califano v. Webster,* 430 U.S. 313 (1977) (where presumptions about males as wage earners and females as their dependents denigrated a woman's earnings under the Social Security Act); *Califano v. Westcott,* 443 U.S. 76 (1979) (where the granting of welfare benefits to families with unemployed fathers, but not to families with unemployed mothers based on assumption that fathers are breadwinners while mothers stay at home).

Where a gender classification is found to exist, it must then be applied to the following test: the classification must serve an important government interest and must be substantially related to achieving that interest. As the Fifth Circuit Court of Appeals has stated, the district court gave little guidance for determining the important government interest to be served by the head and master scheme. The Court, therefore, looked to the State's brief from which only one sentence shed light on the important governmental objective to be served: "One of the two spouses has to be designated as the manager of the community," which the Court interpreted as meaning that the State has a valid interest in providing for management of the community property, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979). If this was the legislative purpose to be served by Article 2404, the State and Mr. Kirchberg failed to show how a gender-neutral means of community management would not serve this state objective. In fact, effective January 1, 1980, the head and master statutes have been repealed and a

gender-neutral method of community management adopted, which suggested to the lower court that it would not be possible for the State to show that Article 2404 is substantially related to the stated legislative interest, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979).

While a governmental body has the right to provide for the orderly management of property of a marriage, the assertion of this right will not immunize its laws if they infringe on the Constitutional rights of its citizens. Such was the basis of this Court's decision in *Trimble v. Gordon,* 430 U.S. 762 (1977) when the constitutionality of an Illinois law prevented the disposition of interstate property to illegitimates was at issue. While any state has the power to control the orderly disposition of property at death, this power will not shield a statute from the Constitution and allow an invidious discrimination to stand, *id.* at 773. The State of Louisiana in the lower court and appellant Kirchberg have made much of the right of Louisiana to regulate property rights between husband and wife as expressed in *Labine v. Vincent,* 401 U.S. 532 (1971), but *Trimble v. Gordon,* 430 U.S. 762 (1977) has seriously eroded that holding:

> . . . we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine.* To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls. *Trimble v. Gordon,* 430 U.S. at 776 n.17.

Where a state statute in the area of marital property rights works to discriminate against any of its citizens it is subject to constitutional scrutiny and its subject matter will not shield it from such scrutiny. Any claim that equal protection scrutiny should not be applied to property regulation in the family context has been laid to rest in *Orr v. Orr,* 440 U.S. 268 (1979), where this Court held that a discriminatory

Alabama alimony statute must fall when the constitutional rights of Alabama's citizens have been violated.

Other possible state objectives for Article 2404 have also failed to withstand judicial scrutiny. One propounded by Alabama in an effort to justify a state statute that awarded alimony to women only in *Orr v. Orr,* 440 U.S. 268 (1979) was that the alimony statutes validly reflected ". . . the State's preference for an allocation of family responsibilities under which the wife plays a dependent role. . ." *Id.* at 281. This statutory purpose has consistently been declared invalid since it is based on old stereotypes and generalizations that the woman stays home and rears the family while the man earns a wage and deals in the world of ideas, *Orr v. Orr,* 440 U.S. at 280; *Craig v. Boren,* 429 U.S. 190, 198 (1976); *Stanton v. Stanton,* 421 U.S. 7, 10 (1975).

Clearly, the facts in this case would invalidate any claim that the legislative design of the statute in question is to benefit the wife as compensation for a long history of discrimination in marriage. Article 2404 is part of the long history of discrimination against married women so the reasoning of *Kahn v. Shevin,* 416 U.S. 351 (1974), *Schlesinger v. Ballard,* 419 U.S. 498 (1975), and *Califano v. Webster,* 430 U.S. 313 (1977) (per curiam), does not apply to Mrs. Feenstra's situation. In each of those cases the statute or regulation benefitted some women and did not put any women at a disadvantage. The laws were upheld because of their legislative objective of compensating certain women for past discrimination.

Moreover, the rationale of promoting "family life" is unavailable here. The head and master system has worked to destroy the Feenstra household. Even if the Feenstra marriage would have failed regardless, the mortgage signed by Mr. Feenstra was made on the family home and both his wife and daughter could find themselves homeless if the mortgage is enforced.

Nor could the state assert that Article 2404 was designed to help needy spouses. While legislation designed to help a needy spouse which uses "sex as a proxy for need" is a legitimate and important state interest, gender-based classifications which are "gratuitous" and without which the needy spouse would not be harmed cannot survive equal protection scrutiny. As in *Orr v. Orr, supra,* at 281-283, a gender-neutral classification would better serve any legitimate State objective than the heavily male favored statute that has injured Mrs. Feenstra.

> Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to rebound. . . to the benefit of those without need for special solicitude. *Id.* at 283.

Any legislative purpose proposed to legitimatize the head and master scheme in Louisiana would necessarily fall under equal protection scrutiny because the legislative objective would not be "substantially related" to achieving that objective. This is additionally born out by the Louisiana Legislature's repeal of the head and master system and its provisions for a gender-neutral system of community management as of January 1, 1980.[3]

In sum, Louisiana Civil Code Article 2404 cannot survive this Court's standard of review applied in sex discrimination cases. The statutes gender-classify and any possible state objective to be achieved by a head and master scheme can be better served by a gender-neutral classification. Mr.

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[3]See La. Civ. Cod. Ann. Arts. 2325-2376, particularly Art. 2346 (West Cum. Pamphlet 1980).

Feenstra had absolute managerial power over the property belonging to both he and his wife which was an arbitrary sex-based preference. All of the State's protective interests toward women and the tradition of Spanish and French civil law cannot save this discriminatory classification. Fortunately, for Louisiana women, with the exception of Mrs. Feenstra, the unconstitutional classifications have now been repealed.

Although the gender based classification of the Louisiana head and master scheme clearly falls within the intermediate level of equal protection scrutiny as discussed above, this Court has not scrutinized a statute which is as invidious as Article 2404.[4] For this reason, appellee Feenstra maintains that sex should be declared a suspect criterion. The case at bar, seeking a declaration that Louisiana Civil Code Article 2404 is unconstitutional under the equal protection clause of the Fourteenth Amendment, is as strong a fact situation and as obvious a denial of equal protection as a Virginia statute forbidding marriage between blacks and whites. (See *Loving v. Virginia,* 388 U.S. 1 (1967). "Distinctions between

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[4]As recently as 1973 the Louisiana Supreme Court spelled out the nature of a wife's ownership in the community:

> Civil Code Article 2404 establishes that, other than for the exceptional case, the husband administers all the things in the community as head and master of the community *as if they were his own separate property*. . . as if they were his own, whether in fact they are or not. . .Since the wife is given options at the dissolution of the marriage in regard to claiming or renouncing her one-half interest in the community of acquets and gains, it cannot be said that she has an interest in the community which is equivalent to perfect ownership. *Creech v. Capitol Mack, Inc.,* 287 So. 497, 507-508 (S. Ct. La. 1973).

This obvious denigration of a woman's role in her community and within her own family is without match in the laws challenged in the sex discrimination cases of the last decade.

citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943). Distinctions between citizens solely because of their sex are as inherently unequal and should be subject to the closest judicial scrutiny.

B. Louisana cannot avoid constitutional scrutiny by special clauses which allow a wife to contract out of the unconstitutional head and master scheme or to avoid an injurious mortgage on the family home.

Equal protection scrutiny cannot be avoided by the claim that Mrs. Feenstra and any other married woman in Louisiana who does not contract out of the head and master system have made a free choice as was maintained by the State of Louisiana and the district court below, *Kirchberg v. Feenstra,* 430 F. Supp. 648 (E.D. La. 1977). As the Fifth Circuit Court of Appeals has so carefully pointed out, when the choice of who manages and controls matrimonial property is made by the State, and not the individual spouses, the State is required to provide equal protection of the law, *Kirchberg v. Feenstra,* 609 F.2d 727, 733 (1979). Further, appellant Kirchberg distinguishes the major sex discrimination cases and bases his entire equal protection argument on the fact that because Mrs. Feenstra could have filed a declaration by authentic act under Article 2334 limiting her husband's power to alienate their family home without her consent, she has been the architect of her own predicament.

This Court has rejected the concept that an insurmountable barrier is necessary before a statute can be considered a denial of equal protection since *Reed v. Reed,*

404 U.S. 71 (1971). In that case, the offending discriminatory statute could have been avoided if the decedent left a will naming an executor. Similarly, the possibility of the decedent writing a will in *Trimble v. Gordon,* 430 U.S. 762 (1977), presented the absence of an insurmountable barrier to avoid equal protection analysis. Yet, this Court firmly disallowed the insurmountable barrier test to survive in that case. "...[T]he focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly. . . Hard questions cannot be avoided by a hypothetical reshuffling of the facts." *Id.* at 773-74.

In a strong denial of a sex-based classification, this Court in *Frontiero v. Richardson,* 411 U.S. 677 (1973), struck down a statute which did not completely deny fringe benefits to female military personnel but gave females the additional burden of proving that their husbands receive over one-half their support from their wives. Therefore, Lt. Sharron Frontiero theoretically did not have an insurmountable barrier to receiving these fringe benefits. This is a burden nonetheless, and this Court refused to tolerate such burdens under the Constitution. Further, this Court struck down Louisiana statutes which automatically exempted women from jury service unless they filed a declaration of their desire to serve, *Taylor v. Louisiana,* 419 U.S. 522 (1975). When all the burdens are on the female to try to balance the scales in her favor, it cannot be maintained that the statutes establish equal classes of citizens.

The fact that Mrs. Feenstra, at some time prior to the mortgage at issue, could avoid the threat to her home, either by eliminating the head and master system through a marriage contract or by filing a declaration to prevent the mortgage without her consent, has no constitutional significance. Both spouses must sign a marriage contract and

this must be agreed to prior to the marriage. The right to contract out of the head and master scheme does not compensate for the husband's automatic power if he refuses or neglects to so contract. The wife always must begin from an unequal bargaining position; she is asking her husband to give up an enormous power that is only his to give away. Further, the State puts an economic burden on couples who desire to give the wife some managerial control over her future property in legal and filing fees which is not placed on couples who allow the State to choose the management scheme. The scheme established by statute clearly reflects disproportionate rights given to the male at marriage, and these are rights not easily taken away. Surely, the supposed right to contract out of the head and master system reflects the inequality of the spouses, rather than the freedom of choice.

It is inaccurate to determine that a couple's failure to contract out of the head and master scheme means that they freely chose the head and master scheme. This presumed intent in Louisiana parallels the "statutory will" theory in *Trimble, supra,* where Illinois claimed that the failure of an illegitimate's father to write a will means that the father chose the State to dispose of his property at death without benefit to his illegitimate child. As this Court said in *Trimble,* "[w]ith respect to any individual, the argument of knowledge and approval of the State law is sheer fiction." 430 U.S. 762, 775, n.16 (1977).

Appellant Kirchberg distinguishes the facts in this case from the line of equal protection cases on the grounds that the "disadvantaged person" in *Trimble v. Gordon, supra, Reed v. Reed,* 404 U.S. 71 (1971), *Craig v. Boren,* 429 U.S. 190 (1976), and *Orr v. Orr,* 440 U.S. 268 (1979), was unable to overcome the insurmountable barrier established by State

law so his or her constitutional rights were denied. As discussed above, this Court has rejected the concept that an insurmountable barrier is necessary in order to find a legislative classification unconstitutional. It is not constitutionally significant if the "disadvantaged person" has the power to overcome a barrier or not. If there is a barrier to overcome, the state has established a classification that is subject to constitutional scrutiny.

According to appellant's argument, contracting out of head and master was unnecessary for Mrs. Feenstra; all she needed to do was file a declaration by authentic act that her consent was required before her husband could mortgage their home which would not involve an attorney's fee. However, she still has notarial and filing fees which is a financial burden placed on the wife and not the husband. Moreover, the wife may never alienate the community property by herself under any circumstances. To prevent her husband from alienating the property by himself, she must be the one to take the affirmative step and file the notarized declaration. The right of the wife to file the declaration does not compensate for the right of the husband to alienate the property by himself. The amount of the transactional costs are irrelevant. By placing all the burdens, financial included, on the female, the State cannot remedy an inherently discriminatory pattern.

C. The Louisiana Civil Code has readily survived constitutional scrutiny and the judgement holding that Article 2404 is unconstitutional has not injured the free flow of commerce in Louisiana.

All assertions that the lower court decision holding Article 2404 unconstitutional has led to a chaotic state of affairs in Louisiana commercial circles has no substance and is without basis in fact. Such statements only add confusion to the case at hand. The Louisiana Legislature has repealed Article 2404 effective January 1, 1980. The repeal was determined during the 1977 Legislative Session when the Senate resolved to adopt an equal management system over community property. The Codal provisions regulating the marriage contract and the rights of the parties in relation to community property have been completely revised.[5] Therefore, all persons doing business in the State of Louisiana, especially lawyers, were put on notice for two and one half years that the head and master system of control over community property would be coming to an end. On December 12, 1979, the Fifth Circuit Court of Appeals held that Article 2404 was unconstitutional and eliminated that codal article from the laws of Louisiana, *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979).

The offensive laws have been repealed since January 1, 1980 and there was simply no confusion or uncertainty after the lower court decision. The Louisiana Attorney General represented the State of Louisiana at the Fifth Circuit appeal, and yet has declined joining the apppeal to this Court. In fact, because of the new equal management codal provisions, the Attorney General's Office asserts the appeal

[5]See La. Civil Code Ann. Articles 2325-2376 (West Cum. Pamphlet 1980).

should be dismissed and considers the State of Louisiana an appellee. If there was any confusion over the lower court decision or if any problems had occurred in the free flow of commerce in the State, the Attorney General could have joined in the appeal seeking a reversal of the Fifth Circuit decision. The concern of appellant Kirchberg for the survival of the Civil Code is unnecessary, because the State has cured any inequities by its new codal provisions dealing with rights over marital property, and the remainder of the Civil Code is intact. If the State of Louisiana deems its Civil Code secure and its citizens protected, there is no need for Mr. Kirchberg to defend the Code single handedly.

Mr. Kirchberg has essentially two concerns over the affect of the lower court decision: (1) which spouse will have the power of alienation over community immovable property from December 12, 1979 and (2) whether the wife will be able to renounce her interest in the community after December 12, 1979. Neither concern, however, represents any problematic situation. The first concern was resolved in January 1, 1977 when Article 2334 was amended to limit the husband's power to alienate immovable community property whether the title is in the names of both spouses or in the name of the husband alone, La. Civ.Code Ann. Art. 2334 (West Supp. 1979). Therefore, both the husband and wife must sign a lease, mortgage or act of sale of community immovables and have been doing so at least since 1977.

The second problem offered by Mr. Kirchberg is based on the affect the lower court decision has on Article 2410 which gives the wife the power to renounce the community as a means of exonerating herself from the debts of the marriage. While any link between Article 2404 and 2410 is dubious, Article 2410 also has been repealed as of January 1, 1980 (West Cum. Pamphlet 1980). It is not within the Court's

purview to determine how Article 2410 will survive the finding that Article 2404 is unconstitutional, but in all practicality no real dilemma exists. The renunciation must be done by notarial act within thirty days after the husband's death or when a Louisiana court has adjudicated the existence of the community debt.[6] Therefore, any wife who would know of her right to renounce the community was also aware that the right of renunciation would be repealed as of January 1, 1980, and knew for several months. The forthcoming repeal of head and master laws controlled all such possible questions. The December 12, 1979 ruling that Article 2404 is unconstitutional has had no bearing on the functioning of other marital property laws.

D. The head and master scheme works to deprive a wife of her property without due process of law in violation of the Fourteenth Amendment.

The lower court decision, *Kirchberg v. Feenstra,* 609 F.2d, 727 (5th Cir. 1979), determined that Article 2404 was unconstitutional because it was a denial of equal protection under the Fourteenth Amendment. The district court found that it is the alleged denial of due process which affects the equal protection claim; "in practical terms these are merely opposite sides of the same issue," *Kirchberg v. Feenstra,* 430 F. Supp. 642, 644,n.2 (E.D.La. 1977). In the alternative to these approaches to the constitutionality of Article 2404, appellee Feenstra also maintains that she has been deprived of her property without due process when the law assumes she has waived her right to notice before her property is alienated or encumbered.

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[6]La. Civ. Code Ann. Art. 2410 (West 1971).

As discussed above, the automatic appointment of the husband as manager of the community results from the operation of state law and not the free choice of the parties or private contract. Mrs. Feenstra was deprived of a significant property interest without procedural due process when her husband, clothed with powers granted him by state law, mortgaged her interest in the family home without any notice to her, and without her knowledge or consent. Her interest in the community home was thereby seized to satisfy a debt of which she was completely ignorant.

The essential meaning of due process is the protection of the right to a notice and hearing, *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). The encumbrance of appellee Feenstra's interest in the family home with no notice to her and the resulting seizure by executory process was possible only by operation of state law, which designated the husband a head and master of the community property. It bears noting that Mrs. Feenstra was notified of the seizure of her home only fortuitously. Article 735 of the Louisiana Code of Civil Procedure designated the husband as the proper defendant in any action asserting a right against the community; therefore, only the husband is statutorily entitled to notice that a lawsuit is pending against the community.

Because Mrs. Feenstra's interest in the community was mortgaged without notice or an opportunity for her to defend that interest prior to its seizure by her husband's alleged creditor, her property has been exposed to liability and seized with no commensurate procedural protection. She has been placed in this unfortunate position by operation of state law, which gives full powers of management of community property to the husband. State law thereby presumes that she has waived her procedural due process right to be notified before her property is alienated or encumbered.

Certainly, due process rights are subject to waiver and can be waived, *Boddie v. Connecticut,* 401 U.S. 371 (1971); *National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 311 (1964). However, the jurisprudence is clear that waiver of constitutional rights should not be inferred lightly, and that courts should indulge every reasonable assumption against waiver, *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Ohio Bell Telephone Co. v. Public Utilities Comm'n.,* 301 U.S. 292 (1937); *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389 (1937).

Indeed, the Supreme Court has stated that a waiver of due process rights is effective only when knowingly, intelligently, and voluntarily made. *D. H. Overmeyer Co. v. Frick Co.,* 405 U.S. 174 (1972); *Swarb v. Lennox,* 405 U.S. 191 (1972). In *Swarb v. Lennox, supra,* a confession of judgment purporting to waive notice and hearing prior to judgment was held unconstitutional and ineffective, even though it was contained in a written contract signed by the debtors. Because of the circumstances surrounding execution of the waiver; i.e., the waiver was part of a contract of adhesion, signed by consumers with no bargaining power to alter the contract and the parties did not understand the significance of the cognovit clause they signed, the waiver could not be enforced legally. The implied waiver of notice is even more indefensible in this case, as it does not appear in writing, and operates automatically, upon marriage by operation of state law, not by private contract entered into by the parties.

Under these circumnstances, Mrs. Feenstra cannot be held to have knowingly, intelligently, and voluntarily waived the due process right to notice and hearing prior to the encumbrance and subsequent seizure of her interest in community property. This makes the statutory designation

of the husband as head and master of the community, and the waiver of the wife's procedural due process rights of notice and hearing which it creates, constitutionally insupportable.

II.

THE LOWER COURT DECISION THAT THE HEAD AND MASTER STATUTE IS UNCONSTITUTIONAL SHOULD BE APPLIED PROSPECTIVELY: BUT THE HOLDING ALSO APPLIES TO THE PARTIES IN THE INSTANT CASE.

The issue of whether a finding that the Louisiana head and master statute was unconstitutional should be applied prospectively was first raised by the State of Louisiana in its brief before the Fifth Circuit Court of Appeals. (Appellee's Brief to the 5th Cir., Pt. IV). The State's brief was adopted by Karl Kirchberg but he neve raised the issue of prospective application until his Petition for Jurisdiction and his appeal before this Court. Although prospective application of a ruling is not usually a part of a decision where a state action is first held unconstitutional, but rather becomes an issue in second generation cases, Mrs. Feenstra agreed to a prospective ruling in her case because she wished to avoid widespread commercial hardship or inequity. A serious inequity has been imposed on Mrs. Feenstra, however, and it was never her intention to relinquish her right to benefit from a favorable decision. Nor is there anything in the record or the lower court decision to indicate that the State or the Fifth Circuit intended Mrs. Feenstra to be excluded from the victory after she had been waging the battle for four years.

Throughout the State's discussion of a prospective ap-

plication of an unconstitutional holding in its brief before the lower court, prospective application is equated with a holding of nonretroactivity. Indeed, this Court has often used the terms "prospective" and "nonretroactive" interchangeably. See *Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940); *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). The fifth Circuit Court of Appeals has followed this Court's lead: "[w]e apply our decision today prospectively only, because a holding of retroactive invalidity of Article 2404 would create a substantial hardship. . .", *Kirchberg v. Feenstra,* 609 F.2d 727, 735 (1979). Of course, the date the lower court's holding of unconstitutionality goes into effect is not October 22, 1974, the date of the mortgage at issue, but December 12, 1979, the date of the decision itself. The only question, with respect to the holding, is whether the finding that Article 2404 is unconstitutional applies to Mrs. Feenstra and her particular injurious situation. Mrs. Feenstra contends she has been included.

As far as the issue of inclusion of Mrs. Feenstra in an invalidation of Article 2404, the State of Louisiana and counsel for appellee, Feenstra have always been in agreement. As was stated by the State in their brief for Appellees in the United States Court of Appeals for the Fifth Circuit,

> If this court should grant Mrs. Feenstra the relief sought and if this court would give such a decision prospective application, the only Louisiana woman affected would be Mrs. Feenstra. (Appellees, Edwin W. Edwards and the State of Louisiana, Brief to the United States Court of Appeals for the Fifth Circuit, at 27.)

Mr. Kirchberg, as a fellow appellee, before the Fifth Circuit, joined the State's brief and at no time in the lower court asserted that a holding of unconstitutionality should not be

applied to the parties before the court.

In the Petition for Jurisdiction and throughout appellant's Original Brief, it is clear that Mr. Kirchberg is not asking this Court to determine whether a holding of the unconstitutionaliity of Article 2404 should be applied prospectively or should be applied to nullify the mortgage on Mrs. Feenstra's home. Rather, Mr. Kirchberg is asking that this Court translate what the Fifth Circuit Court of Appeals meant by its prospective ruling. Clarification of the Fifth Circuit's meaning as to its opinion, however, may be accomplished by other means than a Supreme Court ruling. The State of Louisiana agrees, and in its Motion to Dismiss the State asserts that the Fifth Circuit ". . . has continuing power to accept and pass upon a petition to clarify an outstanding mandate, to declare what it meant by its' mandate, and to change the mandate." (Citations omitted) (at 8).

If this Court decides to reach the issue of whether Mrs. Feenstra should be allowed to reap the benefit of a favorable constitutional decision, current case law points in Mrs. Feenstra's favor. The requirement that Mrs. Feenstra benefit from the prospective overruling is "an avoidable consequence of the necessity that constitutional adjudications not stand as mere dictum," *Stoval v. Denno,* 388 U.S. 293, 301 (1967). Article III of the Constitution compels Federal Courts only to resolve actual and concrete cases and controversies and not address hypothetical questions. Article II courts

> . . . may not decide non-cases which are not adversary situations and in which nothing of immediate consequences to the parties turns on the results, *Marbury v. Madison,* Cranch 137 (1803).

Article III forecloses a federal court from applying a new rule to conduct which occurs only subsequent to its an-

nouncement. "The announcement of the new rule. . . means that it becomes intimately bound up with the decision of a case and controversy. In a literal sense, it is *decisive* of a case and controversy", Perspective Overruling and Retroactive Application in the Federal Courts, 71 *Yale L.J.,* 907, 933 (1962). Thereby, a federal court holding that Article 2404 is unconstitutional, but not applicable to Mrs. Feenstra and the mortgage held on her home would be an advisory opinion only.

As was pointed out by Paul J. Mishkin in The Supreme Court, 1964 Term, 79 *Harvard L.R.,* 56, 60-61 (1965), there is a practical problem with constitutional adjudications made prospective only. If the new ruling does not include the parties litigant and parties anticipate such a limiting ruling, there will be no stimulus to initiate a suit seeking a change in the law. Such a lack of stimulus would result in federal courts not having the opportunity to rule on many unsound or outmoded legal doctrines.

The Fifth Circuit devoted much of its opinion to the decree that an actual case and controversy was presented by the parties, *Kirchberg v. Feenstra,* 609 F.2d 727, 731 (1979). It is inconceivable, therefore, that the lower court took the extraordinary course of not applying its decision to the parties herein. Article III considerations and the pronouncements of this Court require that the individual who sought judicial review of a constitutional question, be accorded the benefit if the decision is in her favor. (See *U.S. v. Dunbar,* 470 F.Supp. 704, 708 (D. Conn. 1979), aff'd. 610 F.2d 807 (2d Cir. 1979).)

In civil cases, reviewing lower federal court holdings which dealt with constitutional issues, this Court has made prospective only rulings which included the parties litigant. In *Cipriano v. City of Houma,* 395 U.S. 701 (1969), for

example, this Court reviewed a Louisiana election law in light of the equal protection clause of the Fourteenth Amendment, reviewed the decision of an Article III court, and found the state law unconstitutional and made its decision prospective only. The plaintiff who initiated the suit to have the statute declared unconstitutional was not denied the particular relief sought. In the remand order, Mr. Cipriano was awarded all costs he incurred in bringing the lawsuit and, more importantly, the election he sought to prevent was nullified and local officials were prevented from issuing bonds pursuant to that election. (See Appellee's Appendix A)

Also in *Corpus Christi Parish Credit Union v. Martin,* 358 So.2d 295 (S.Ct.La. 1978), *cert. denied,* 439 U.S. 897 (1978), which is distinguishable from the case at bar, and in which the majority did not deal with the constitutional issue, the dissenting opinion discussed in detail their preference for a nonretroactive holding that Article 2404 and 2334 were a denial of equal protection. This Court might consider the recommendations of this dissent opinion because it is the only opinion where a Louisiana Court has grappled with the difficulties of declaring the Louisiana head and master system unconstitutional with its attendant impact on mortgages already operating within the State. While the dissent would have held the judicial invalidation of the statute to be applied prospectively only ". . . in the case before the court, the declaration of invalidity should be applied, lest the judicial declaration be considered merely as dicta." *Corpus Christi Parish Credit Union, supra,* at 303 (Tate, J. dissent).

Thus, there is no precedent for an Article III court to deny the benefit of a constitutional ruling to the party litigant even if the ruling is applied prospectively only. Given the

expressed desires of the briefing parties to the Fifth Circuit and given the lower court's expressed opinion that an actual case and controversy existed in Mr. Kirchberg's attempts to enforce his mortgage, it is clear that the decision that the Louisiana head and master scheme is unconstitutional is applicable to Mrs. Feenstra and the mortgage on her home.

CONCLUSION

The head and master statute of Louisiana provides a clearly discriminatory gender-based classification when a gender-neutral classification provides for the efficient and equitable management over marital property. There is no legitimate state interest that could be presented which would justify the patently offensive concept of male as the head and master over the community, or which would be substantially relaxed to the sex-based classification. The burdens and injury placed upon appellee Feenstra with the pending loss of her home, have worked to deny Mrs. Feenstra's right to equal protection of the law.

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be affirmed with a clarifying statement that the holding of the unconstitutionality of Article 2404 applies to the parties before this Court. The mortgage held by appellant Kirchberg on Mrs. Feenstra's home, which is the subject of this lawsuit, should be declared null and void.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JOSEPH Q. CIPRIANO	*	CIVIL ACTION
VERSUS	*	NO. 67-1853
CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLIAN	* * * *	SECTION C

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JUDGMENT

The plaintiff, Joseph Q. Cipriano, having appealed to the United States Supreme Court from Judgment entered in this cause on the 23rd day of July, 1968, wherein the United States Supreme Court ordered, adjudged and decreed that such Judgment be reversed with costs assessed at $1,903.84 in favor of Jopseh Q. Cipriano, plaintiff.

Now in accordance with the Judgment of the United States Supreme Court, dated the 16th day of June, 1969,

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment of this Court entered the 23rd day of July, 1968, be, and the same is hereby vacated and set aside; and it is further

ORDERED, ADJUDGED AND DECREED that all

provisions of the Constitution and statutes of the State of Louisiana which have the effect of requiring ownership of property and payment of taxes thereon as a condition of voting in utility revenue bond selections in said State, be, and they are hereby decreed to be in violation of the Constitution of the United States of America and, therefore, null, void and without effect; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, the City of Houma, G. Leslie Broussard, Mayor, Christian L. Olivier, Charles Davidson, Peter Bourgeois, Jr., Samuel Lusco and Wilbert P. Bonvillain, their successors, agents, servants, employees and all other persons in active concert with them, be and they are hereby permanently restrained and enjoined from enforcing, executing, administering, or in any manner giving effect to the provisions of the Constitution and statutes of the State of Louisiana which have the effect of requiring the ownership of property and payment of taxes thereon as a condition of voting in utility revenue bond elections in the State of Louisiana; and it is further

ORDERED, ADJUDGED AND DECREED that the said defendants, their successors, agents, servants, employees and all other persons in active concert with them, be and they are hereby permanently restrained and enjoined from issuing any bonds pursuant to the utility revenue bond election held in the City of Houma on October 24, 1967, which said election is decreed to be null, void and without effect; and it is further

ORDERED, ADJUDGED AND DECREED that Judgment be and is hereby entered that Joseph Q. Cipriano recover from the City of Houma, G. Leslie Broussard, Mayor, Christian L. Olivier, Charles Davidson, Peter Bourgeois, Jr., Samuel Lusco and Wilbert P. Bonvillain, or

their successors in office, the sum of One Thousand Nine Hundred Three and 84/100 ($1,903.84) Dollars as costs on appeal, and that he have execution therefor.

New Orleans, Louisiana, October 14th, 1969.

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

/s/ Illegible

UNITED STATES DISTRICT JUDGE

/s/ Illegible

UNITED STATES DISTRICT JUDGE